**Board of Alien Labor Certification Appeals**
**United States Department of Labor**
**Washington, D.C.**

NOTICE: This is an electronic bench opinion which has not been verified as official.

DATE: February 11, 1998
CASE NO: 97-INA-0087

***In the Matter of:***

JOSEPH L. FELDUN
*Employer*

***On Behalf of:***

IRIS JEANETTE VASQUEZ
*Alien*

Appearance: Dan E. Korenberg
Encino, CA
For the Employer and Alien

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

## DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for

the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. §656.27 (c).

## Statement of the Case

On March 27, 1995, Joseph L. Feldun ("employer") filed an application for labor certification to enable Iris Jeanette Vasquez ("alien") to fill the position of Domestic Cook at an hourly wage of $12.16 (AF 4). The job duties for the position are described as follows:

> Plans menus, cook, bake and serve meals in private home for family members and guests. Plan and prepare weekly menu for employer's approval as per employer's requirements and guest lists; Prepare low sodium, low-fat, non cholesterol, nutritionally balanced meals and fancy foods, decorated according to occasion; Estimate consumption and order food stuff and supplies; Bake breads, pastries, pies & desserts; Carve, cook season, boil, saute, steam, baste, stir meats, poultry and fish as per occasion; Prepare soybean meats, grain meats & vegetables on daily basis; Decorate foods and party trays; Do seasonal cooking, such as preserving and canning fruits & vegetables; Set table; Serve foods & refreshments; Maintain kitchen and storage areas clean & hygienic; Wash dishes, pots, pans and utensils; Clean oven, refrigerator, freezer and kitchen appliances (AF 179).

The job requirements are two years of experience in the job offered including preparation of low-sodium, low-fat, non cholesterol foods. The employer further specified that the employee must be able to work from 7:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m. on all days of the week except Monday and Friday (AF 179).

On March 28, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO found that the employer failed to establish that the position was bona fide, full-time employment under §656.3. The CO therefore requested that the employer submit evidence which established that the position constitutes permanent, full-time employment. The CO also determined that the employer was not in compliance with §656.20 (c) (1) and §656.20 (c) (4) which require the employer to show that it has the ability to pay the employee at the prevailing wage. The CO noted that the employer has no tax identification number because he has

[1] All further references to the Appeal File will be noted as "AF."

not employed a cook previously. Lastly, the CO found that the employer failed to comply with §656.21 (b) (2) (I) (A) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. The requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States. Specifically, the CO objected to the employer's requirement that all candidates possess experience cooking special low-sodium, low-fat, non cholesterol diets (AF 176).

In rebuttal, dated May 29, 1996, the employer argued that it documented that the position was full-time employment by specifically describing the numerous job duties to be performed by the cook in Item 13 of the application. The employer attached a sworn affidavit answering the questions set forth by the CO in the NOF. The employer stated that he recently divorced his wife who prepared meals for the family and business guests in the past. He also asserted that he does not have the time or energy to prepare his own meals because he practices law and works very long hours. With regard to the ability to pay issue, the employer provided tax filings which show that he has the income and resources to pay the cook (AF 136). The employer also contended that the requirement that the cook have experience preparing low-sodium, low-fat, non cholesterol meals is not unduly restrictive. In support of this contention, the employer pointed out that he was not requiring that applicants have two years of experience in cooking these type of foods exclusively, but that the cook's experience merely includes preparing healthy dishes. He further stated that his special dietary needs arise from his active participation in amateur body building events.

The CO issued the Final Determination on July 30, 1996 denying the labor certification. The CO determined that the employer's evidence relating to full-time employment was ineffective and thus concluded that he failed to comply with §656.3. Subsequently, the employer requested reconsideration which the CO denied on September 11, 1996. Thereafter, the employer requested administrative review of Denial of Labor Certification pursuant to §656.26 (b) (1).

## Discussion

The issue presented by this case is whether the employer demonstrated that the offered position of Cook constitutes full-time, permanent employment under §656.3 of the federal regulations.

According to §656.3, "employment" means permanent full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that the position is permanent and full-time, and if the employer fails to meet this burden, certification may be denied. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988).

In the NOF, the CO requested that the employer submit evidence which clearly demonstrates that the position represents full-time employment. The CO specifically instructed the employer to document the number of meals prepared daily and weekly, the length of time

required to prepare each meal, and the individuals for whom the meals are made (AF 129). Since the employer indicated that he frequently entertains relatives and business guests, the CO requested that he describe in detail the frequency of household entertaining in the 12-month period immediately preceding the filing of the application. The CO directed the employer to document any additional tasks which might be required of the employee, and to identify who prepared the meals up until the filing of the application. Lastly, the CO noted that the job offer involves a split shift, morning and afternoon, which is not customary for the position and thus requested the employer to document that it is justified.

In response, the employer, the only member of his household, reported that the cook will prepare breakfast and dinner five days a week. During the morning shift, which is from 7:00 a.m. to 10:00 a.m., the cook will prepare breakfast, clear the table, wash the dishes, pots, pans and utensils, and prepare breads, pastries, or pies. During the afternoon shift, which is from 4:00 p.m. to 9:00 p.m., the cook will prepare a low-sodium, low fat, non cholesterol dinner. After preparing dinner, the employee will serve dinner and dessert, clean the kitchen thoroughly, and wash all dishes, pots, pans, and utensils. From 8:00 p.m. to 9:00 p.m., the cook will prepare snacks for the employer and occasionally for his employees at the law firm (AF 142). The employer stated that because he is an attorney, he entertains partners, associates, and clients frequently and, as a result, the cook must prepare large dinners for his guests. He asserted that he holds dinner parties for family members on special occasions such as holidays and birthdays. The employer set forth a list of the dates on which he entertained guests for the past calendar year starting at the date the application was filed. This list includes dinner for seven fellow colleagues twice a month, a Mother's day brunch, a Father's Day brunch, a Labor Day lunch, Thanksgiving and Christmas dinners, a New Year's Day lunch, and two birthday parties for his mother and father (AF 143). The employer stated that the cook will not be required to perform any other duties other than those pertaining to the position of a domestic cook. The employer stated that his wife performed the cooking duties until their recent divorce. Finally, he noted that the split shift is required because he is at work during the daytime which means that the cook's services are not needed from 10:00 a.m. to 4:00 p.m.

In denying certification, the CO relied on several points. Foremost, the CO concluded that the employer's rebuttal evidence was largely unsubstantiated. For instance, the CO found that the employer never specified what type of breakfast, dinner, or snack would be prepared, but simply relied on vague statements such as "it takes the cook approximately one hour to prepare breakfast" (AF 132). The CO also found that there was no detailed documentation explaining why it would require the employee one hour to wash dishes after both breakfast and dinner. Moreover, the CO determined that the employer failed to substantiate his assertions regarding entertainment dinners and luncheons with relatives and business guests. Although he described the events giving rise to these various meals, the CO found that there was no documentation regarding the type of meals served or the specific number of guests served. The CO also determined that the employer failed to justify the split shift since the cook could feasibly clean the kitchen and prepare dinner during the day, and the employer could reheat the meal when he returned from work at 6:30 p.m. Finally, the CO found that the employer failed to justify the

requirement of experience in the preparation of low-sodium, low-fact, non cholesterol foods regarding his dietary needs due to his bodybuilding activities. The CO found the employer's photographs of himself participating in bodybuilding events unpersuasive in proving that he has special dietary needs (AF 133).

The employer demurred to the CO's rejection of the rebuttal evidence and argued that he demonstrated that the position constitutes full-time employment. However, the Board has held that the CO is not required to accept rebuttal evidence as credible or true. Rather, the CO must consider the employer's statements and accord them the weight they rationally deserve. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). In this case, the CO weighed the evidence provided by employer and arrived at a rational conclusion. For this reason, we find that labor certification was properly denied.

## ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

**NOTICE FOR PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk***
***Office of Administrative Law Judges***
***Board of Alien Labor Certification Appeals***
***800 K Street, NW, Suite 400***
***Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.